ES HVAC Sdn Bhd v Miracle Asset Builder Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM)(NCVC)-1444–07 OF 2018
VERNON ONG, HARMINDAR SINGH AND HAS ZANAH MEHAT JJCA
26 FEBRUARY 2019

Civil Procedure — Summary judgment — Whether triable issues existed — Whether High Court should not have granted summary judgment when defendant raised bona fide triable issues that merited full trial — Whether plaintiff's case against defendant contained unusual features which required further investigation in trial under limb 'there ought for some other reason to be trial of that claim' occurring in O 14 r 3 of the Rules of Court 2012

The appellant was one of six nominated subcontractors ('NSC') appointed by the respondent to carry out various works on a project. The appellant's subcontract alone was worth RM5,245,506.50 which was 4.5% of the total contract sum for the works. The subcontract provided that if the appellant did not complete its job by a stipulated date, it had to pay the respondent liquidated and ascertained damages ('LAD') at the rate of RM29,000 per day and RM78,000 per day in respect of section 1 and section 2 works respectively. The respondent sued the appellant for RM6.768m in LAD for 87 days' delay in completing the works in section 2. The High Court granted the respondent summary judgment for the said sum pursuant to an application under O 14 of the Rules of Court 2012 ('the ROC'). In its instant appeal against the decision, the appellant argued that the High Court was wrong to grant the judgment when there were triable issues such as: (a) when was the appellant's subcontract actually completed. In this regard, the respondent had not exhibited evidence of the certificate of practical completion of the works; (b) the respondent had failed to show which part of the works undertaken by which NSC had actually caused or contributed to the delay of the overall project; (c) if the delay was cumulatively caused or contributed to by more than one NSC (including the respondent itself), then the length of delay caused by each of those parties should have been identified and ascertained in order to determine the extent of their respective culpability.

Held, unanimously allowing the appeal, setting aside the summary judgment and remitting the case back to the High Court for full trial:

(1) The High Court had no jurisdiction to grant summary judgment as the appellant had raised triable issues which merited a trial. In particular, the merits of the following questions had to be examined fairly and justly at

a trial — (a) whether the appellant did in fact delay the execution and completion of the aircon works; (b) if so, whether such delay caused and/or contributed to the delay in the overall completion of the project; and (c) if so, to what extent ought the appellant to be held responsible for the overall delay. The appellant had pleaded all these issues in its defence and counterclaim and had claimed that the works were completed in accordance with the agreed time-frame under the subcontract (see paras 13–14 & 16).

(2) A remarkable feature in the instant case was that after completion of the works, the LAD claim against the appellant — of RM6.768m — far exceeded the subcontract value of RM5,245,506.50. It was also unusual that the whole of the LAD (RM7.3m) claimed by the employer against the respondent was now to be paid only by the appellant when there were five other NSCs, excluding the respondent, who could possibly have contributed to the delay. After all, the appellant's subcontract was only 4.5% of the value of the whole works. These unusual features had to be investigated in a full trial as they were a classic example of the words 'there ought for some other reason to be a trial of that claim' found in O 14 r 3 of the ROC. The O 14 jurisdiction was only exercisable in very clear cases as it was not intended to shut out defendants from their day in court (see paras 12 & 14–15).

[Bahasa Malaysia summary

Perayu adalah salah seorang daripada calon subkontraktor ('CSK') yang dilantik oleh responden untuk menjalankan pelbagai kerja untuk suatu projek. Subkontrak perayu sendiri bernilai RM5,245,506.50 yang merupakan 4.5% daripada keseluruhan kumlah kontrak untuk kerja tersebut. Subkontrak itu memperuntukkan bahawa jika perayu tidak menyiapkan kerjanya pada tarikh yang ditetapkan, ia perlu membayar responden ganti rugi jumlah tertentu dan ditentukan ('GRJTD') pada kadar RM29,000 setiap hari dan RM78,000 setiap hari berkaitan kerja seksyen 1 dan seksyen 2 masing-masing. Responden menyaman perayu sebanyak RM6.78 juta untuk GRJTD bagi kelewatan 87 hari menyiapkan kerja di seksyen 2. Mahkamah Tinggi memberikan responden penghakiman terus untuk jumlah tersebut menurut permohonan di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('KM'). Dalam rayuannya terhadap keputusan tersebut, perayu berhujah bahawa Mahkamah Tinggi terkhilaf kerana memberikan penhakiman tersebut kerana terdapat isu-isu yang perlu dibicarakan seperti: (a) bila subkontrak perayu sebenar siap. Berhubung itu, responden tidak mengekshibitkan apa-apa keterangan perakuan amalan siap kekrja tersebut; (b) responden telah gagal menunjukkan bahagian kerja yang dilaksanakan yang CSK sebenarnya telah menyebabkan atau menyumbang kepada kelewatan keseluruhan projek itu; (c) jika kelewatan itu secara kumulatif disebabkan atau disumbangkan oleh lebih daripada satu CSK (termasuk responden sendiri), maka tempoh kelewatan yang disebabkan

A oleh setiap pihak patut dikenalpasti dan ditentukan bagi tujuan menentukan sejauh mana kesilapan mereka.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan penghakiman terus dan meremitkan semula kes kepada Mahkamah Tinggi
B untuk perbicaraan penuh:

(1) Mahkamah Tinggi tidak mempunyai bidang kuasa untuk memberikan penghakiman terus kerana perayu telah menimbulkan isu-isu yang boleh dibicarakan yang mewajarkan perbicaraan. Secara khususnya, merit
C persoalan-persoalan berikut perlu diteliti dengan adil dan saksama semasa perbicaraan: (a) sama ada perayu telah sebenarnya menangguh pelaksanaan dan penyelesaian kerja hawa dingin; (b) jika begitu, sama ada kelewatan itu menyebabkan dan/atau menyumbang kepada kelewatan untuk keseluruhan penyiapan projek itu; dan (c) jika begitu,
D setakat mana patut perayu dipertanggungjawabkan untuk keseluruhan kelewatan. Perayu telah mempli kesemua isu-isu tersebut dalam pembelaannya dan tuntut balas dan telah mendakwa bahawa kerja tersebut telah disiapkan menurut tempoh masa yang dipersetujui di bawah subkontrak (lihat perenggan 13–14 & 16).

E (2) Ciri-ciri yang luar biasa dalam kes ini ialah selepas selesai kerja tersebut, tuntutan GRJTD terhadap perayu — sejumlah RM6.768 juta — jauh melebihi nilai subkontrak sebanyak RM5,245,506.50. Adalah juga luar biasa bahawa keseluruhan GRJTD (RM7.3 juta) yang dituntut oleh majikan terhadap responden kini hanya akan dibayar oleh perayu walhal
F terdapat lima CSK lain, tidak termasuk responden, yang mungkin telah menyumbang kepada kelewatan itu. Bahkan, subkontrak perayu hanyalah 4.5% daripada nilai keseluruhan kerja tersebut. Ciri-ciri yang luar biasa ini perlu disiasat dalam perbicaraan penuh kerana ia adalah contoh klasik kata-kata 'there ought for some other reason to be a trial of
G that claim' yang didapati dalam A 14 k 3 KM. Bidang kuasa A 14 hanya boleh dilaksanakan dalam kes-kes yang amat jelas kerana ia tidak dimaksudkan untuk menafikan defendan-defendan mengemukakan kes mereka ke mahkamah (lihat perenggan 12 & 14–15).]

H **Notes**

For cases on summary judgment in general, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9616–10630.

Cases referred to

I *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, SC (refd)

Noh Hyoung Seok v Perwira Affin Bank Bhd [2004] 2 MLJ 203, CA (refd)

United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657, FC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 3

Appeal from: Civil Suit No JA-22NCVC-15–02 of 2018 (High Court, Johor Bahru)

Lee Chan Leong (Siew Ee Mei with him) (Chan Leong & Co) for the appellant.
R Paramanandan (Clarence Edwin with him) (Clarence Edwin Law Offices) for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] This appeal emanates from the Shah Alam High Court order dated 28 June 2018. The learned High Court judge had granted the respondent's application for summary judgment under O 14 of the Rules of Court 2012 ('the ROC 2012') for the sum of RM6,768,000 on its claim for liquidated and ascertained damages ('LAD').

[2] Aggrieved with this decision, the appellant appealed to this court. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

SALIENT FACTS

[3] The salient facts giving rise to the civil suit appear in the grounds of judgment and in the submissions of the parties. The facts can be restated as follows. Through a letter of award dated 23 April 2015 ('the main contract'), the respondent was appointed by Distinctive Properties Sdn Bhd ('the employer') to undertake and complete the balance of the works in the project ('the works') as stipulated therein. The respondent had in turn awarded part of the works known as 'air conditioning and ventilation works' ('the aircon works') to the appellant vide a letter of award dated 9 June 2015.

[4] Under the main contract, the contract sum for the works was RM116,856,000. The works was to be 'commenced, carried out and completed in Sections' within a period of 372 days from the date of commencement. The date of commencement and possession of site was stated as 25 April 2015. The completion date for the whole works was stated as 30 April 2016. The respondent had also agreed to appoint various nominated subcontractors as listed in Appendix B ('the NSCs') and was required to enter into formal subcontract agreements with each and every of the them. It appeared that the appellant was only one of six NSCs and was tasked under the

A subcontract with undertaking the aircon works for the contract sum of RM5,245,506.50, the value of which worked out to be 4.5% of the total contract sum for the works.

B **[5]** Meanwhile, under the subcontract for the aircon works, the contract sum for the works, as stated earlier, was RM5,245,506.50. The date of commencement was to follow the main contractor's schedule. The date for completion was also to follow the main contractor's schedule. It was also stipulated that the completion period shall be scheduled according to the main contractor's work program and the NSC was required to plan and work along C with the main program. Importantly, should the appellant fail to complete the aircon works by the date for completion or any extension of time granted in the main contract, then LAD of RM29,000 per calendar day and RM78,000 per calendar day would be imposed on the appellant for section 1 and section 2 works respectively. Nevertheless, pursuant to a letter from the employer's D architect dated 18 May 2017, an extension of time ('EOT') was granted with the revised date of completion of 5 May 2016 for section 1 work and 4 September 2016 for section 2 work.

E **[6]** The respondent's case was that the appellant only completed the section 2 work on 3 January 2017 as evident from the certificate of completion and compliance ('CCC'). Due to the appellant's delay, the respondent suffered loss and damages. The employer by letter dated 7 June 2017 imposed on the respondent RM7.3m as LAD. The respondent contended that based on the terms of the subcontract the appellant was contractually and legally liable to F pay to the respondent the sum of RM6.786m as agreed LAD for the 87 days delay it took to complete its works for section 2.

[7] The learned judge agreed with these assertions and granted summary G judgment. A compelling factor in the reasoning of the learned judge was that since there was no affidavit in reply, all the assertions of the respondent must be accepted. In actual fact, there was an affidavit filed in opposition by the appellant but this was struck out by the learned SAR during case management on the ground that it was filed out of time. Curiously, no appeal was filed by the H appellant who was at that time represented by its previous solicitors. The appellant was therefore confined to relying on its defence which was filed earlier as well as showing cause based on the respondent's affidavit and documents filed.

I THE INSTANT APPEAL

[8] Before us, the appellant raised various issues to show that there were indeed triable issues. The crux of the appellant's argument was that apart from

producing the CCC, the document referred to in cl 7 of the subcontract known as the certificate of practical completion ('CPC') was not produced. It was contended that all the works including the aircon works would have been completed earlier in point of time even before the CCC could be issued. So when the works were actually completed is a triable issue.

[9] It was also argued that the works were actually broken down into many parts to be respectively undertaken by the six NSCs as well as the respondent itself. Apart from showing that there was a delay in the completion of the works as a whole, there was no evidence of which part of the works undertaken by which NSC that had actually caused or contributed to the delay and if at all, the length of such delay as well as its extent of responsibility.

[10] Further, if delay was cumulatively caused or contributed by more than one party, be it the NSCs and/or the respondent, then the length of delay caused by each of these parties ought to have been clearly identified and ascertained in order to determine the extent of their responsibilities respectively. To be fair, the respondent could have produced the master schedule of works evidencing the sequence of various works respectively undertaken by the NSCs as well as the respondent itself.

[11] It was further argued that even from the respondent's own document, the issue of liability and quantum on LAD amongst the respondent and the various NSCs was still open and undecided. This can be seen from the employer's letter dated 7 June 2017 wherein it was stated:

> You are most welcome to discuss with your nominated subcontractors on the LAD issues. In the interim, we have requested our consultants to finalise the final account for the said contract by mid June 2016 irrespective of whether your company and your nominated sub contractors have submitted their final claims for the purposes of final account. You and your nominated sub contractors are advised to discuss with our consultants on your claims and additional variation orders if any.

[12] Now, the law with respect to summary judgment is fairly trite. The general rule is that a plaintiff must prove its case in a trial. The O 14 jurisdiction is only to be exercised in very clear cases. The intention was not to shut out defendants from their day in court (see *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183). Even in the absence of a statement of defence or affidavit, the application for summary judgment can be resisted by relying on the plaintiff's own documents (see *Noh Hyoung Seok v Perwira Affin Bank Bhd* [2004] 2 MLJ 203). In any event, the jurisprudence under O 14 r 3 of the ROC 2012 is clear. Even if the defendant was not able to point to a specific issue which ought to be tried, but nevertheless satisfied the court that

there were circumstances that ought to be investigated, then the words 'there ought for some reason to be a trial' would be invoked (see *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657).

[13] In our view, the issues raised by the appellant constituted triable issues such that the court had no jurisdiction to grant summary judgment. In particular, the merits of the following questions must be examined fairly and justly at a trial:

(a) whether the appellant did in fact delay in the execution and completion of the aircon works;

(b) if so, whether such delay had caused and/or contributed to the delay in the overall completion of the works; and

(c) if so, to what extent the appellant ought to be held responsible from the overall delay.

[14] We note that the appellant had pleaded all these issues in the defence and counterclaim and had stipulated that the works were completed in accordance with the subcontract and within the time frame agreed. A remarkable feature in the instant case is that after the completion of the works, the LAD claim against the appellant of RM6,768,000 far exceeds the contract sum of RM5,245,506.50.

[15] It is also unusual that the whole of the LAD claim by the employer against the respondent by the letter of 7 June 2017 is now to be paid by only one of the NSCs when there were five others, excluding the respondent, who could have possibly contributed to the delay. After all, the appellants' works amounted to only 4.5% of the value of the whole works. In our view, these unusual features ought to be investigated at a full trial as they are a classic example of the words 'there ought for some other reason to be a trial of that claim' found in O 14 r 3 of the ROC 2012.

CONCLUSION

[16] For these reasons, we were persuaded that the High Court had no jurisdiction to grant summary judgment as there were issues raised which merited a trial. As such, this was a fit and proper case for appellate intervention. Accordingly, the appeal was allowed and the order of the High Court was set aside. The matter was remitted to the High Court for a full trial. Costs here and below of RM7,500 was ordered to be paid to the appellant within 14 days subject to payment on the allocator. Deposit, if any, to be refunded.

Appeal allowed unanimously, the summary judgment set aside and the case remitted back to the High Court for full trial.

Reported by Ashok Kumar